(3)

No. 89-1906

In The

Supreme Court of the United States

October Term, 1989

SAMUEL DEUTSCH,

Petitioner,

vs.

ROBERT G. FLANNERY, ROBERT C. MARQUIS, RICHARD W. STUMBO, JR., WALTER G. TREANOR, JOHN G. BANNISTER, WAYNE T. DONNELS, JOHN G. MCDONALD, JUSTIN M. ROACH, JR., JOSEPH ROSENBLATT, THE WESTERN PACIFIC RAILROAD COMPANY, and UNION PACIFIC CORPORATION,

Respondents.

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondents attempt to finesse the fact that the instant action is based upon their fraud in the purchase of securities. Like the Ninth Circuit, they totally ignore section 27 of the Securities Exchange Act of 1934[1] ("Exchange Act"), 15 U.S.C. § 78aa (1988). Like the Ninth Circuit, they do not address the crucial distinction between acquisition of *stock* and acquisition of *control* under the Interstate Commerce Act ("Commerce Act"). *See* Pet. at 23-24. Like the Ninth Circuit, they make no attempt at a harmonious construction of the two federal statutes. Rather, as shown below, they misconstrue the Commerce Act, ignore relevant precedents, and cite cases which are clearly distinguishable.[2]

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[1] That section – upon which the instant action is based, A-60 – confers "exclusive jurisdiction" on the federal courts over all claims under the Exchange Act. A-39-40.

[2] Respondents' entire brief is based on a fundamental misreading of the Complaint and a corresponding distortion of the ICC's opinions. Contrary to their assertion, Resp. Br. at 2, the Complaint is about fraud, not about their tender offer price not "reflecting" something (which is no cause of action under any law, state or federal).

So also, the ICC's 1982 opinion, *Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific Railroad Company – Control – Missouri Pacific Corporation and Missouri Pacific Railroad Company*, 366 ICC 458 (1982), was on what Wespac's non-tendering stockholders should receive in the freezeout, not on what Deustch had received. *See, e.g.*, 366 ICC at 635 (ICC's obligation to protect "minority shareholders"); *id.*, at 648 ("serious reservations concerning the [ICC's] adjudication of the fairness of [Union Pacific's] offer to the holders of the 13 percent untendered [Wespac] common stock", per concurring opinion). Its subsequent decisions, Resp. Br. at 3-5, denied those stockholders' petitions to reconsider that opinion since they did not meet the strict conditions therefor. *In re Union Pacific Corp. – Control-Western Pacific Railroad Co.*, ICC Fin. Dkt. No.

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ARGUMENT

I. The Ninth Circuit Misconstrued The Commerce Act

A. The Stock/Control Dichotomy

Petitioner showed that the Commerce Act and regulations thereunder distinguish acquisition of *stock* – over which the ICC has no jurisdiction – from acquisition of *control* – over which it has plenary jurisdiction. Pet. at 23-25. For this purpose, the ICC authorizes the use of independent voting trusts. *Id.*, at 23-24. Citing several decisions from courts and the ICC in support thereof, petitioner contended that the Ninth Circuit's decision is contrary to well-settled precedent. *Id.*, at 23-25.

Respondents offer no response. Instead, they rely on language from a predecessor statute (which language, they concede, is absent from the present statute, Resp. Br. at 9 n.7), and simplistically contend that the ICC could

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30,000 (ICC Jan. 28, 1987) (Lexis, TRANS Lib., ICC File), *aff'd sub nom, Western Pacific Stockholders' Protection Com v. ICC*, 484 F.2d 1301 (D.C. Cir. 1988). Obviously, the claims and the claimants in those proceedings were completely different from those at bar, and the lower courts have misinterpreted the ICC's 1982 opinion as including the tender offer price, A-3-4, 14.

Since the petition "identified no errors in those decisions [in this respect]," respondents contend that a writ should not be issued herein. Resp. Br. at 12. However, the lower courts' errors in this regard do not raise issues warranting this Court's attention at present, given the constraints of Rule 10, Rules of the Supreme Court; that explains the petition's silence on the issue. Nevertheless, petitioner maintains that this Court need not defer to the lower courts on the issue, since misinterpretation of the ICC's opinion is *not* an issue of fact; rather, this Court may interpret the ICC's opinion *de novo*.

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"review and approve the consideration paid for the acquisition of control." Resp. Br. at 9. Respondents' contention – like the Ninth Circuit's holding[3] – is beside the point, since the ICC itself does not consider stock acquisition as control acquisition. Pet. at 23. *Also see Water Transport Ass'n – Petition For Declaratory Trust*, 367 ICC 559 (1983) (ICC's policy is "to avoid interference in the workings of the marketplace where the law . . . does not require the ICC's intervention"); *Canadian Pacific Ltd. and Soo Line Corp. – Petition For Declaratory Order; Rio Grande Industries, Inc. et al – Purchase and Related Trackage Rights – Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL*, 1990 ICC LEXIS 7 at 4-5, (January 12, 1990) (where carrier held 56% stock of another, ICC permission not needed for increasing stock holdings because no change in control).

B. The Commerce Act Provisions On Securities

Petitioner argued that the Exchange Act applies to carrier securities, and that the ICC has no jurisdiction over transactions involving such securities in the stock market. Pet. at 12-17. Petitioner pointed out that even where the Commerce Act confers *some* jurisdiction on the ICC over carrier securities – e.g., 49 U.S.C. §§ 11301(b)(1), 11367 –, it makes the securities expressly subject to the

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Besides, respondents' suggestion that Deutsch should "go back to the ICC", Resp. Br. at 7, is quixotic. Petitioner Deutsch had no standing before the ICC, since he sold his stock to respondents before they even *filed* their application with the ICC. 366 ICC at 472 (Respondents "currently own 87.25 percent" of Wespac stock through a voting trust).

[3] The Ninth Circuit held that the voting trust did not "deprive the ICC of jurisdiction herein", because the trust only "allows carriers to effectively complete a merger transaction while they are awaiting ICC approval", A-8.

Exchange Act. *Id.* at 13-14. Hence, the Commerce Act clearly contemplates that all transactions in carrier securities be subject to the Exchange Act, and the Ninth Circuit's decision creates an unwarranted statutory conflict. *Id.*

Respondents answer that section 11343, 49 U.S.C. § 11343 (1988), (which is at issue herein), unlike sections 11301 and 11367, is covered by Section 11341, 49 U.S.C. § 11341 (1988), Resp. Br. at 15. Since 11341 exempts 11343 transactions from "all other law", they argue that the transaction at issue is exempt from the Exchange Act.

Respondents' argument is misconceived, because Section 11343 does not even mention securities. It merely addresses (for present purposes) "merger", "consolidation" and "acquisition of control." A-50-54. Hence, the question is whether these terms *include* incidental securities transactions. The answer is "no", because (a) Congress clearly intended that carrier securities be subject to the Exchange Act, Pet. at 18; (b) the Commerce Act provisions dealing with securities expressly make them so subject, *id.*, at 13-14; (c) the ICC scrupulously distances control transactions from securities transactions through the independent voting trust, *id.*, at 23-24; and (d) otherwise, the ICC would become a "supercourt" with unlimited jurisdiction, *id.*, at 13.[4] *Cf. Public Citizen v. U.S. Dep't of Justice*, ___ U.S. ___, 109 S.Ct. 2558, 2566 (1989) ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention . . . "). *Accord, Dole v. United Steelworkers of*

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[4] Thus, *Suffin v. Pennsylvania R.R. Co.*, 276 F. Supp. 549 (D. Del. 1967) *aff'd*, 396 F.2d 75 (3d Cir. 1968), *cert. denied*, 393 U.S. 1062 (1969), which respondents rely on for distinguishing the statutory provisions of the Commerce Act, Resp. Br. at 15, is irrelevant.

America, ___ U.S. ___, 110 S.Ct. 929, 934 (1990); *Massachusetts v. Morash*, __ U.S. ___, 109 S.Ct. 1668 (1989). Primary protection for investors is always ensured by the Exchange Act. *See, e.g., Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 329 (D.C. Cir. 1983) (Even if carrier exempts itself from ICC's "securities jurisdiction", SEC "will continue to regulate . . . issuance of securities to the public"). *Cf., Otis & Co. v. Pennsylvania R.R. Co.*, 61 F.Supp. 905, 910 (E.D.Pa. 1945) (ICC's permission for stock issuance does not foreclose directors' liability for negligence or breach of fiduciary duty).

Thus, the Exchange Act applies to all securities transactions, including the ones at bar. The stock/control dichotomy under the Commerce Act is in recognition of this. Maintaining that dichotomy permits enforcement of both statutes and avoids the conflict created by the Ninth Circuit.[5]

C. The "Necessity" Component

Petitioner argued that the "necessity component" of section 11341, 49 U.S.C. § 11341 (1988), must be construed strictly, as courts have repeatedly held. Pet. at 25-28. In the instant case, it was not "necessary" for respondents to defraud anybody in order to implement the permitted transaction. *Id.* Therefore, petitioner contended that section 11341 could not authorize the exemption asserted by respondents, and the Ninth Circuit's decision to the contrary raises an extremely important question of federal law.

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[5] Thus, contrary to respondents' suggestion, Resp. Br. at 14 n.9, Deutsch strenuously seeks enforcement of *both* statutes.

The Ninth Circuit itself never addressed this issue. Pet. at 25. Respondents now argue that the exemption is "necessary" herein because otherwise

> a participant . . . might find itself compelled in some other forum to pay a price other than that approved by the ICC.

Resp. Br. at 16. They cite no authority in support of their proposition that holding them liable for fraud would somehow interfere with the ICC's regulatory authority.

As already shown, the instant action neither impeaches the tender offer "price" nor anything "approved by the ICC". Pet. at 19-22; *supra* at 1 n.2. Respondents do not explain why they should be exempt from the fidelity to truth required of everyone else in the stock market.

II. Respondents' Reliance on *Schwabacher* is Misplaced

Respondents rely on *Schwabacher's* holding that "no capitalization or indebtedness be carried over" in a railroad merger without ICC consent, Resp. Br. at 10; *Schwabacher v. United States*, 334 U.S. 182, 198 (1948). However, they do not explain how liability for fraud is part of "capitalization or indebtedness."

Respondents then point out that Deutsch seeks "more than five times the amount" permitted by the ICC, whereas *Schwabacher* precluded a much smaller claim. Resp. Br. at 10. Hence, they say, letting the claim go to trial "would undercut the regulatory structure" of the Commerce Act.[6] *Id.*

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[6] This argument proves too much, because bigger frauds generate claims for higher damages. Therefore, respondents' argument would – if upheld – encourage carriers to commit big frauds and avoid small ones!

Respondents do not explain how the amount of damages claimed has *any* bearing on the "regulatory structure". As this Court has held, judicial resolution of claims like the ones at bar has nothing to do with the ICC's jurisdiction. Pet. at 10-11.

III. Respondents' Purported Distinctions of Controlling Cases Miss The Mark

While respondents' silence with respect to most cases petitioner cited is eloquent enough, the distinctions they attempt with others are telling. For example, relying on *Pittsburgh and Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n*, ___ U.S. ___, 109 S.Ct. 2584 (1989) – amongst others – petitioner argued that federal courts cannot "pick and choose" among federal statutes. Pet. at 7, 9. Respondents find a "fundamental misconception" on petitioner's reliance, because the statutory provisions at issue are different, Resp. Br. at 14. They do not explain how that difference impairs the mandate against judicial legislation in any way.

Petitioner analogized the instant case to *Rembold v. Pacific First Federal Sav. Bank*, 798 F.2d 1307 (9th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987), where the Ninth Circuit itself upheld 10b-5 claims in the face of FHLBB approval under the National Housing Act. Pet. at 15-16. Respondents attempt to distinguish this case on two grounds, both of which are factually wrong. First, contrary to their *ipse dixit*, Resp. Br. at 15, Congress clearly intended that carriers comply with the Exchange Act. Pet. at 18. Second, the stock price in the case at bar was not subject to ICC approval. Indeed, respondents did not even *file* the tender offer documents with the ICC, unlike the *Rembold* defendants. Pet. at 15-16.

Then again, petitioner argued that enforcement of the Exchange Act does not impinge upon the Commerce Act,

just as it did not impinge upon enforcement of Arizona's insurance statute in *Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453 (1969). Pet. at 21-22. Respondents seek to distinguish that case on the ground that it involved "the approval of mergers by [a] *state* regulatory agenc[y]", Resp. Br. at 15 (emphasis in original). This distinction is also misplaced, because in that case, a federal statute protected Arizona's statute, which was what created the conflict before this Court. 393 U.S. at 457. Absent the McCarran Ferguson Act, the Arizona statute would have automatically given way under the Supremacy Clause. More important, the reasoning employed therein is fully applicable to this case.[7]

Respondents' distinction from *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986), is erroneous for the same reasons as those of the Ninth Circuit: a 10b-5 damage award is not inconsistent with an administrative agency's finding of "fair price", whether the agency is state or federal. Pet. at 21.

IV. Respondents' Cases Are Clearly Distinguishable

Respondents' cases are far removed from the one at bar. For example, *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); Resp. Br. at 7, held that a state law action against a railroad for "improper failure to furnish cars", *id.*, at 325, did not lie because the action was based on an ICC-permitted abandonment of a branch line. This Court reasoned that the ICC's exclusive jurisdiction over railroads' abandonment decisions "is critical to the congressional scheme". *Id.*, at 321. Moreover, the

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[7] Respondents blithely assert that "There is no question that Congress intended . . . that any decision regarding such relief in a railroad merger be vested exclusively in the ICC." Resp. Br., at 16 n.11. The absurdity of this proposition, i.e., that the ICC is to decide the relief in a federal court action, is too obvious to merit discussion.

Commerce Act "spells out with considerable precision the remedies available to a shipper" injured by such abandonment, *id.*, and that plaintiff had abandoned his claims before the ICC, *id.*, at 324. Therefore, the Supremacy clause precluded the claims asserted there.

In the case at bar, the ICC's jurisdiction over stock transactions occuring years prior to a merger is *not* critical to the regulatory scheme under the Commerce Act. Besides, that Act does not provide a remedy for defrauded sellers like Deutsch.

So also, in *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); Resp. Br. at 11, 12, a union sought to challenge a railroad's change of working conditions as being violative of the Railway Labor Act. The First Circuit rejected the challenge, since the ICC had specific statutory authority to impose labor protective conditions, 49 U.S.C. § 11347 (1988), which it had done. The instant case involves neither such statutory authority nor such action by the ICC.

Schwartz v. Bowman, 244 F.Supp. 51 (S.D.N.Y. 1965), Resp. Br. at 11, involved claims against a carrier under the Investment Company Act. That Act expressly exempted carriers "subject to regulation under the [Commerce Act]", and the ICC had expressly determined the carrier to be so exempt. *Id.*, at 66. Thus, the Court would have had to annul the ICC's determination in order to try that case; obviously, it had no jurisdiction to do so. 244 F.Supp. at 69. In the case at bar, the Exchange Act contains no comparable exemption provision.

Lastly[8], respondents' reliance on *Interstate Investors, Inc. v. Transcontinental Bus System, Inc.*, 310 F.Supp. 1053

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[8] The distinction between *Bruno v. Western Pac. R.R. Co.*, 498 A.2d 171 (Del. Ch. 1985), Resp. Br. at 11, and the case at bar

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(S.D.N.Y. 1970), Resp. Br. at 11, 16, for claiming retroactive exemption is misconceived because they do not meet the tests specified therein. For granting such exemption, that Court required (a) that the acts at issue in the civil suit be "the precise ingredients" of the ICC's authority in approving the transaction; and (b) that a finding of liability create a "collision" between the courts and the ICC over construction of the law. 310 F.Supp. at 1066. In the case at bar, respondents meet neither of these tests: The issues herein are totally different from those before the ICC, and the ICC did not even attempt to construe the Exchange Act.

CONCLUSION

For the foregoing reasons, the Writ should be issued as sought.

Dated: New York, New York
September 12, 1990

Respectfully submitted,

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was recognized by the federal court in subsequent litigation between Bruno and the respondents, as explained earlier. Pet. at 6-7.